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No. 92-34

In The

Supreme Court of the United States

October Term, 1992

MUSICK, PEELER & GARRETT, LEONARD CASTRO, ROBERT SCHUCHARD, J.H. COHN & CO., ED BACANI and ROBERT TORKAR

Petitioners,

v.

EMPLOYERS INSURANCE OF WAUSAU and FEDERAL INSURANCE COMPANY

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Petitioners, Musick, Peeler & Garrett, Leonard Castro, Robert Schuchard, J.H. Cohn & Co., Ed Bacani and Robert Torkar reply to the Opposition to Petition for Writ of Certiorari of Employers Insurance of Wausau ("Wausau") and Federal Insurance Company ("Federal") and respectfully pray that a writ of certiorari issue to review

the decision of the United States Court of Appeals for the Ninth Circuit, dated January 23, 1992.

REPLY

Wausau and Federal introduce a list of decisions of lower federal courts implying a right of contribution in section 10(b) of the Securities Exchange Act and rule 10b-5 of the Securities Exchange Commission. Apparently their argument is that this Court should not review the decision of the Ninth Circuit because other federal courts have made similar decisions for 24 years.

Wausau and Federal ignore two vital points. First, the circuit courts are in explicit conflict regarding whether an implied right of contribution exists, and the conflict makes the law governing multi-million dollar cases depend on venue. Because state boundaries are immaterial to jurisdiction in securities cases, forum shopping is inevitable. Second, this Court has refused to defer to persistent error by lower federal courts in the interpretation of federal securities laws.

In *Lampf, Pleva, Lifkind, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___, 115 L.Ed.2d 321, 111 S.Ct. 2773, 59 U.S.L.W. 4688 (June 20, 1991) this Court considered the appropriate statute of limitations to be applied to the fraud victim's implied claim under Section 10(b). In substance, of course, *Lampf, Pleva* dealt with implementation of a claim recognized by this Court, where this case deals with the existence of a claim never recognized by this

Court. From the perspective of whether to grant certiorari, however, *Lampf, Pleva* illustrates why the arguments of Employers and Federal make no sense.

The rule borrowing state law to supply a statute of limitations for a federal claim derived from federal law and a decision of this Court nearly 100 years old. *Id.* at 4689. Lower federal courts applied the state law borrowing rule to claims under Section 10(b) at least as long before *Lampf, Pleva* as 1953. *Fratt v. Robinson*, 203 F.2d 627, 634 (9th Cir. 1953); *see Janigan v. Taylor*, 344 F.2d 781, 783 (9th Cir. 1965), *cert. denied* 382 U.S. 879 (1965). Virtually unanimous authority adopted the state law borrowing rule. *Lampf, Pleva*, footnote 1. Nevertheless, this Court granted certiorari to review an unpublished Ninth Circuit decision which applied the state law borrowing rule when two other circuit courts had created a conflict. *Id.*

The need for certiorari in this case is clearer than the need was in *Lampf, Pleva*. The implied claim for contribution has no grounding in any federal statute, lacks support of any arguably applicable decision of this Court, lacks the longevity of the state law borrowing rule, has less consistent support in the lower courts and is the subject of explicit conflict between Circuits.

In *Lampf, Pleva*, this Court granted certiorari and ultimately decided that federal law, not state law, should be the source of the statute of limitations. In this case, the

Court should grant certiorari and ultimately hold that no claim for contribution can be implied in Section 10(b).

Respectfully submitted,

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